RSA 118/2002
BEFORE
THE HON'BLE MR. JUSTICE B.P. KATAKEY

These appeals by the successors-in-interest of the original plaintiff, Bimalendu Chakraborty, are directed against the judgment and decree dated 23.05.2002 passed by the learned Civil Judge (Senior Division) No.2, Cachar at Silchar, in Title Appeal Nos.3/1994 and 5/1994, dismissing the former and partly allowing the later, by partly setting aside the judgment and decree dated 11.10.1993 passed by the learned Sadar Munsiff No.2, Cachar at Silchar in Title Suit No.120/1991.

2. The predecessor-in-interest of the present appellants instituted the said suit praying for passing a decree declaring the plaintiff's prescriptive right of access and implied grant of necessity and easement over the path described in Schedule-3 to the plaint and also for permanent injunction restraining the defendants from interfering with the peaceful enjoyment or putting any obstruction therein, contending inter alia that Bimalendu Chakraborty, the original plaintiff, since the purchase of Schedule-2 land, vide registered deed of sale dated 20.02.1969, has been using the path, measuring 50 ft. 3 inch in length and 5 ft. in breadth, described in Schedule-3 to the plaint, which is over Schedule-1 land belonging to the defendants. The further pleaded case of the plaintiff is that the defendants, who are the plaintiff's close relatives, taking advantage of the temporary absence of the plaintiff and with a view to grab the plaintiff's land started creating disturbances and tried to raise illegal construction over the said path, so as to block the only ingress and egress to the plaintiff's land. It has also been pleaded that there is no path other than the path described in Schedule-3 leading to the plaintiff's land, which path the plaintiff has been enjoying for more than 20 years peacefully without any obstruction from any quarter and hence has acquired prescriptive right of easement.

3. The suit of the plaintiff has been contested by the defendants by filing joint written statement denying the claim and contending inter alia that no path exists as described in the plaint. It has also been pleaded that the plaintiff never use any path as shown in Schedule-3 to the plaint and in fact has used another path for his ingress and egress from the suit land. The defendants have, therefore, pleaded that the plaintiff has not acquired any prescriptive right.

4. During pendency of the suit the original plaintiff died and in his place the present appellants were substituted, since the right to sue survives on them.

5. The Trial Court on the basis of the pleadings of the parties, framed the following issues for determination:-
(i) Is there any cause of action for the suit against the answering defendants?
(ii) Is the suit maintainable in its present form and manners?
(iii) Whether the predecessor-in-interest of the answering defendants assured the plaintiff any right of path as alleged?
(iv) Whether Schedule-3 land is part and parcel of the homestead of defendants?
(v) Whether the plaintiff had any path for ingress and egress to his homestead land since time of his purchase of the same?
(vi) Whether the plaintiff acquired any legal over the land described in Schedule-3 of the plaint?
(vii) To what relief, if any, the plaintiff is entitled to?

6. The plaintiff in order to prove his case, has examined 3(three) witnesses and proved 10(ten) documents marked as Exts.-1 to 10. The defendants have exam

ined 5(five) witnesses and proved 4(four) documents marked as Exts.-A to D. The Trial Court, thereafter, vide judgment dated 11.10.1993 passed a modified decree in favour of the plaintiff. Being aggrieved the plaintiff filed Title Appeal No .3/1994. Another appeal being Title Appeal No.5/1994 was also preferred by the d efendants. The First Appellate Court while partly allowed Title Appeal No.5/1994 vide judgment dated 23.05.2002, however, has dismissed the other appeal. Hence the present appeals.

7. The appeals being RSA Nos.114/2002 and 118/2002 were admitted for hearin g vide orders dated 28.08.2002 and 07.02.2003, respectively, on the following su bstantial questions of law:-

In RSA No.114/2002

1) Whether the first appellate court has rightly interpreted the provisions of Section 25 of the Limitation Act, 1963, while passing the impugned judgment and decree or not?

2) Whether the appellate judgment and decree are in conformity with the pro visions laid down under Order 41 CPC or not?

3) Whether the impugned judgment and decree passed by the first appellate c ourt is tenable in the eye of law?

In RSA No.118/2002

1) Whether the impugned lower appellate judgment is at all a judgment in T. A. No.3/95 inasmuch as the same is a verbatim copy of the judgment in T.A. No.5/ 95 without deciding the points raised in T.A. No.3/95?

2) Whether the learned lower appellate Court erred in law in passing the im pugned judgment by relying on a proposal of compromise filed by the defendants b ut not acted upon the parties?

3) Whether the learned lower appellate Court erred in law in holding that t he right of the plaintiff to use path shall not be transferable to the vendor wh o shall purchase the land of the plaintiff?

4) Whether the impugned judgment is in compliance of Order 41 Rule 31 CPC?

8. I have heard Mr. S.K. Ghosh, learned counsel for the appellants and Mr. R.P. Sarmah, learned Sr. counsel appearing for the respondents.

9. Referring to the judgment passed by the First Appellate Court, it has be en submitted by the learned counsel for the appellants that since the First Appe llate Court is the final Court on fact, it is required to discuss all the eviden ce on record, both oral and documentary, more so, when it is a judgment of rever sal. According to the learned counsel, the First Appellate Court while reversing the judgment and decree passed by the Trial Court did not discuss the evidence on record. The learned counsel further submits that there being clear evidence a bout the enjoyment of Schedule-3 land as a path for more than 20 years openly an d without any obstruction from the defendants, the Appellate Court ought to have decreed the suit of the plaintiff as a whole, in view of the provision containe d in Section 25 of the Limitation Act, 1963.

10. Mr. Sarmah, learned Sr. counsel appearing for the respondents, on the ot her hand, has submitted that since the plaintiff has claimed the right by prescr iption, over the Schedule-3 land, which admittedly belongs to the defendants, th e plaintiff must prove the ingredients of Section 25 of the Limitation Act, 1963 , which the plaintiff having failed to do the First Appellate Court ought not to have passed the decree in favour of the plaintiff in respect of the part of Sch edule-3 land. The learned Sr. counsel, however, has submitted that since the def endants have no objection in passing such decree by the First Appellate Court, t he decree passed by the First Appellate Court may not be disturbed.

11. Section 25 of the Limitation Act provides that where the access and use of light or air to and for any building have been peaceably enjoyed therewith as

an easement, and as of right, without interruption, and for twenty years, and where any way or watercourse or the use of any water or any other easement (whether affirmative or negative) has been peaceably and openly enjoyed by any person claiming title thereto as an easement and as of right without interruption and for twenty years, the right to such access and use of light or air, way, watercourse, use of water, or other easement shall be absolute and indefeasible. Sub-section (2) provides that each of the said periods of twenty years shall be taken to be a period ending within two years next before the institution of the suit wherein the claim to which such period relates is contested. The plaintiff in order to succeed, therefore, has to prove that he is using the path in Schedule-3 for 22 years or more before institution of the suit peaceably and openly claiming title thereto. It appears from the judgment passed by the First Appellate Court that the plaintiff has failed to prove that he has used the land in Schedule-3 as a path for more than 22 years before institution of the suit peaceably and openly, claiming title, so as to confer absolute and indefeasible right by prescription of law. The Appellate Court, however, considering the necessity of having a path leading to the plaintiff's land and also having regard to the fact that the plaintiff and the defendants are close relatives, decreed the suit of the plaintiff in part in respect of the path of 4 ft. wide, which is part of the Schedule-3 land.

12. Both the Courts below, however, while passing the judgments did not discuss the entire evidence on record, which necessitated perusal of the evidence by the Second Appellate Court, with a view to shorten the period of litigation, wherefrom it appears that the plaintiff could not prove the ingredients of Section 25 of the Limitation Act. Though the plaintiff examined himself as PW-1 and claimed to use the Schedule-3 land since the date of purchase in the year 1969, the same, however, has not been supported by the plaintiff's own witness, namely, PW-3. The plaintiff also could not adduce evidence that he is using the path peaceably and openly and claiming title thereto, so as to confer on him absolute and indefeasible right by prescription of law. It is also not the case of the plaintiff that he is using the said path claiming title. That apart, in Ext.-1 sale deed executed on 20.02.1969 there is absolutely no mention relating to the existence of any path. The First Appellate Court, therefore, ought to have allowed the appeal preferred by the defendants, who, however, having regard to the interest of the parties and also to give the plaintiff a right of way, passed the decree in respect of 4 ft. wide path. As noticed above, the defendants are not aggrieved by such decree passed by the Appellate Court.

13. That being the position, I do no find any merit in the present appeals and hence the appeals are dismissed.

14. The parties are, however, directed to bear their cost throughout. Registry is directed to send down the records forthwith.